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January 26, 1993

Donna R. Searcy, Secretary
Federal Communication Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: Comments of the City of Sterling, Colorado in Response to Notice of Proposed Rulemaking in MM Docket 92-266

Cable Television Rate Regulation

Dear Ms. Searcy:

Enclosed on behalf of the City of Sterling, Colorado are an original and four copies of Sterling's Comments filed in the above-referenced rulemaking proceeding.

Sincerely,

Douglas W. Harold, Jr.

klb

Enclosures

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ORIGINAL

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket 92-266
	)	
Rate Regulation	)	

COMMENTS OF STERLING, COLORADO IN RESPONSE TO NOTICE OF PROPOSED RULEMAKING

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January 26, 1993

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
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Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992	)	MM Docket 92-266
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COMMENTS OF STERLING, COLORADO IN RESPONSE TO NOTICE OF PROPOSED RULEMAKING

The City of Sterling, Colorado ("Sterling"), by counsel, files the following Comments in the Cable Television Rate Regulation Rulemaking proceedings announced by Notice of Proposed Rulemaking ("NPRM") in MM Docket 92-266 (FCC 92-544), released December 24, 1992.

I. EFFECTIVE COMPETITION

a. Procedure for determining absence of effective competition

1. The Commission proposes (NPRM, ¶17) to base its effective competition findings initially on the franchising authority's determination that effective competition does not exist. In turn, the franchising authority's determination concerning effective competition is proposed to be made as part of the basic rate regulation authority certification process established by §623(a)(3) of the 1992 Cable Act.

2. Sterling urges the Commission to adopt regulations permitting a franchising authority to determine, independently of and prior to the §623(a)(3) certification process, that the cable system is not subject to effective competition. This would allow communities lacking the resources or the desire to regulate basic cable service rates to nevertheless establish the absence of effective competition, with the expectation that a cable operator, once having been categorized as "not subject to effective competition," would be more inclined to moderate its basic service rate structure in order to avoid a regulatory backlash from the franchising authority.

3. Sterling proposes that a franchising authority seeking to establish the absence of effective competition file a simple request with the Commission, using a standard form designed to elicit the factual basis on which the franchising authority's request is grounded. Service on the cable operator should be mandatory. If the cable operator fails to file an objection to the franchising authority's request within 30 days after such service, the franchising authority's showings made pursuant to the form request should be taken as admitted by the cable operator and, if facially complying with the §623(l)(1) of the 1992 Cable Act, should be deemed sufficient for the Commission to "find" officially that effective competition does not exist. Such "finding" should thereafter prevail unless and until the cable operator demonstrates to the Commission through a separate proceeding (which can be abbreviated if the franchising authority agrees with the cable

operator's showings) that circumstances have changed sufficiently to require a reversal of the earlier "no effective competition" finding.

4. If objections are made by the cable operator to the franchising authority's request for a finding of no effective competition, such objections could be resolved through the Commission's normal adjudicatory processes. However, in light of the Congressional objective of ensuring that consumers are protected from unreasonable increases in rates for basic cable service, an initial presumption should exist, based on the franchising authority's request for a finding of no effective competition (if such request is also supported by facially adequate grounds for such a finding), that such competition does not exist. Such a presumption, which should continue unless and until the franchising authority's request is denied through final Commission action, is necessary to prevent cable operators from taking undue advantage of delays that might occur in disputed cases.

b. Definition of franchise area

5. Section 623(l)(1) of the 1992 Cable Act defines effective competition in terms of specified conditions within the "franchise area." However, nowhere is "franchise area" defined, which, unless the Commission establishes a standard for determining what portions of a political subdivision's geographical area are contained within a "franchise area," can have results unintended by and inconsistent with the 1992 Cable Act, particularly in rural or less populous areas. For example, in a rural community, if the "franchise

area" is deemed as coterminous with the geographical boundary of the community, and only high population density portions of the community (comprised in the aggregate of, say, 30% or less of the households in the entire community) were actually passed by a cable system, then effective competition would always be deemed to exist under the §623(l)(1) standard, even though a very high penetration may exist for the households passed by the cable system. As another example, a geographically widespread but sparsely populated community may have two or more widely separated areas within the community receiving cable service from two (or more) different and independent cable operators. Although there may be no actual competition between or among the different cable systems, if the "franchise area" is deemed to be the entire community, then under the 1992 Cable Act effective competition would exist and the community would be deprived of regulatory authority.

6. The results obtained from the preceding examples flow directly from one possible interpretation of the undefined term "franchise area." These results, which could not occur under the Commission's prior signal presence tests for effective competition, flow potentially from a latent ambiguity in the 1992 Cable Act, i.e., that Act's failure to define the term "franchise area." To avoid results inconsistent with the purposes of the 1992 Cable Act, Sterling urges the Commission to define "franchise area" for purposes of effective competition determinations as being "all portions of a political subdivision subject to a franchising authority's jurisdiction, within 200 feet of which are installed

any portions of the distribution system of a given cable operator's cable system."[1] Such a definition, or one similar in context, would assure that only parts of a community actually capable of receiving cable service were included in the definition of franchise area, consistent with the clear intent of the 1992 Cable Act.

c. Scope of effective competition analysis

7. Consistent with Sterling's foregoing suggestions concerning the definition of "franchise area", Sterling urges the Commission to adopt a rule reflecting its tentative conclusion to require effective competition determinations to be made on a "franchise area" basis, even if a cable system serves more than one franchise area in a geographic region.

8. However, Sterling opposes the Commission's suggestion that effective competition determinations could be made on a system-wide (as opposed to franchise area) basis for cable programming services. Adoption of such a larger geographic unit would blur the distinctions between potentially economically and demographically diverse franchise areas served by the same cable system, and franchise areas where effective competition did not exist might lose the benefit of Commission regulatory oversight of cable programming services rates due to being consolidated with

[1]200 feet from the distribution system is suggested as a standard distance within which cable operators are generally willing (or required) to extend service to households passed by the cable system. Flexibility could be permitted if a different distance were specified in a franchise agreement as being within the distance for mandatory extension of cable service.

other franchise areas where effective competition did exist. Moreover, system-wide cable programming services rate regulation may fail to properly reflect, for example, differences in franchise fee requirements or other differences affecting the reasonableness of cable programming services rates.

9. Harmonization with §623(d) of the 1992 Cable Act (requiring a uniform rate structure throughout the geographic area in which a cable system provides cable service), suggested by the NPRM as a goal to be furthered by system-wide cable programming services rate regulation, can best be obtained by the cable operator. Specifically, it is within the operator's power to adjust his rates downward in franchise areas served by his system not subject to regulatory oversight, thereby causing those rates to conform to the rates charged in the franchise areas subject to rate regulation; thus, a uniform rate structure will result throughout the geographic area served by that system operator.

II. OTHER CERTIFICATION ISSUES

a. Joint certification and regulatory jurisdiction

10. Sterling does not oppose the Commission's proposal to allow two or more communities served by the same system to file a joint certification and to exercise joint regulatory jurisdiction (NPRM, ¶21). However, Sterling urges the Commission to not adopt incentives or requirements for such coordination. First, the 1992 Cable Act extends the rate regulation entitlement to a franchising authority (cf. §623(a)(2)(3)). No statutory provision appears to support a mandatory or even an incentive-based coordinated

regulatory scheme, although voluntary coordination appears permissible. Second, a requirement for coordination would dilute the voice and influence of the residents within a given franchise area, which appears to be inconsistent with the provisions of §623(a)(3)(c), which require a "reasonable opportunity for consideration of the views of interested parties" including, presumably, the views of franchise area residents.

b. Changes in competitive status

11. Sterling agrees with the Commission's tentative proposal to require a cable operator, who believes it is no longer subject to rate regulation, to first petition a franchising authority for a change in regulatory status (NPRM, ¶28). However, Sterling believes, in the case of agreement by the franchising authority concerning a change in status, that a formal Commission notification of such petition, with a requirement for the franchising authority to forward its findings and the basis of such findings to the Commission for subsequent ratification, is unnecessarily burdensome and cumbersome. A simple notification to the Commission by the franchising authority that rate regulation is no longer in place due to agreement between the parties concerning the presence of effective competition should suffice.[2] However, if there is a dispute concerning the cable operator's request for

[2]As a practical matter, because the decision to affirmatively regulate rates is within a franchising authority's control once its certification is approved, the decision to cease such rate regulation, whether due to changed competitive circumstances or for any other reason, should also be solely within the franchising authority's control.

a change in competitive status, then Commission review should be available to the parties.

c. Certification revocation or disapproval

12. In cases of disapproval or revocation of a franchising authority's certification, Sterling believes the Commission should require the cable operator to file its schedule of basic rates with the Commission, as suggested at ¶29 of the NPRM. Absent such filing by the cable operator, the Commission would be unable to effectively fulfill its rate regulation obligations which are triggered by certification disapproval or revocation. However, in recognition of the demands on the Commission's resources predictably arising from the requirements imposed by the 1992 Cable Act, Sterling believes it would be administratively infeasible for the Commission to adhere to the same deadlines applied to franchising authorities. In order to avoid a hiatus in regulatory oversight during the pendency of any Commission deliberations concerning the reasonableness of basic service rates in a given franchise area, Sterling urges the Commission to implement a mandatory interim rate structure, based on an objectively applicable rate setting formula or benchmark, that would protect the public against unregulated rate increases until the Commission issues its decision on the appropriate rate structure. This would be permissible under the 1992 Cable Act if the Commission adopted Sterling's earlier proposal to sever the effective competition determinations from the certification proceedings.

III. RATE-SETTING REGULATIONS

13. Sterling urges the Commission to adopt regulations that do not unduly restrict the ability of cable systems to incur and recover appropriate costs associated with the basic tier of service. Sterling is concerned that such restrictions may cause cable operators to limit basic service programming to the statutorily required minimum components, to the detriment of potential subscribers with low or fixed incomes. Although Congress intended by the 1992 Cable Act to prevent unchecked rate increases in basic service, it found, at §2(a)(18), that "Cable television systems are often the single most efficient distribution system for television programming," and, at §2(b)(1), that its policy is to "promote the availability to the public of a diversity of views and information ... ." Consistent with the foregoing findings, any regulations that provide an incentive to cable operators to restrict basic tier programming to the statutory minimum (i.e., to limit the availability of diverse views and information) should be avoided.

a. Cost-based versus benchmark regulation

14. Sterling urges the Commission to adopt a benchmark rate regulatory mechanism. The other alternative considered, i.e., a cost-based approach, would likely be too complex for efficient local administration, and it would not provide any real incentives to a cable operator to minimize its costs. However, Sterling recognizes that reliance on a benchmark alone may allow cable operators providing service at a lower rate to increase their rates without justification up to the benchmark level. To avoid this

potential, Sterling suggests that the Commission establish a rebuttable presumption that the lower of either the benchmark rate or the rate currently charged is reasonable. Thereafter, a cable operator seeking a rate increase could attempt to demonstrate through a cost-based showing that a higher rate was reasonable; until such showing was made and a rate increase approved, the operator would be obligated to adhere to either its current rate structure or the benchmark rate, whichever was lower. This approach would provide a "safety valve" to prevent confiscatory rates, while still protecting the public from unjustified rate increases.

b. Benchmark alternatives

15. Sterling urges adoption of the "past regulated rate" benchmark alternative, discussed at ¶44 of the NPRM. Another alternative discussed, i.e., that of using the rates charged by cable systems facing effective competition (NPRM, ¶¶41-43), is probably infeasible if only because of the differing standards established by the Commission over the past years for "effective competition." Moreover, the Commission's prior "three signal standard" for effective competition has been generally recognized as not being a realistic determination of whether effective competition actually existed in a given franchise area; this resulted in the overwhelming majority of cable systems being found subject to effective competition, thus allowing them virtually unchecked rate increases. Accordingly, any benchmark based on rates charged by cable systems facing effective competition would

likely result in an artificially high benchmark standard.

16. Using the average rates charged by cable systems operating in 1992 to develop a benchmark is prone to the same problems as addressed above. If the average rates charged by the largely unregulated cable television industry are used to develop a benchmark, such a benchmark will probably be too high to accurately represent a "reasonable rate".

17. The other benchmark alternative, i.e., the "past regulated rate" standard, appears most appropriate, particularly if the standard is based on rates charged on or before 1986, the year in which the provisions of the 1984 Cable Act depriving most franchising authorities of any rate regulating authority became effective. Although any benchmark is likely to be less than perfect, a prior regulated rate benchmark is not prone to the same inherent disadvantage of the other proposed benchmark alternatives. An increase could be factored into the 1986-based (or other year) benchmark to reflect inflationary factors. If this were done, individual cable systems experiencing objectively verifiable cost increases exceeding the inflation rate could attempt to justify a rate increase beyond the benchmark, as suggested above by Sterling. However, in the meantime the inflation-adjusted benchmark could be established as presumptively reasonable unless and until a higher rate was approved.

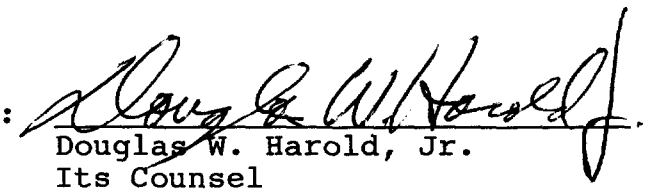
IV. CONCLUSION

18. Sterling appreciates the opportunity to comment on the Cable Television Rate Regulation Rulemaking proceedings. It

recognizes the complexity of the tasks assigned to the Commission by the 1992 Cable Act, and is prepared to participate in any manner deemed helpful to the Commission in fulfilling its mandate under that legislation.

Respectively submitted,

THE CITY OF STERLING, COLORADO

By: 
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January 26, 1993